UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 502343
Issued to: Michael L. Monaghan

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2366

Michael L. Monaghan

This appeal has been taken in accordance with Title 46 U.S.C. 7702 and 46 CFR 5.30-1.

By order dated 2 December 1983, an Administrative Law Judge of the United States Coast Guard at St. Louis, Missouri suspended Appellant's mariner's license for two months, on twelve months' probation, upon finding him guilty of negligence. The specification found proved alleges that while serving as Operator on board the M/V STEEL PIONEER under authority of the license above captioned, on or about 7 May 1983, Appellant navigated his flotilla in such a manner that the port lead barge allided with the guidewall at Markland Lock, Ohio River.

The hearing was held at Pittsburgh, Pennsylvania on 18 August 1983.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence seven exhibits and the testimony of one witness.

In defense, Appellant offered in evidence five exhibits, the testimony of one witness and testified in his own behalf.

At the end of the hearing, the Administrative Law Judge rendered an oral decision in which she concluded that the charge and specification had been proved. She then served a written order suspending License No. 502343 issued to Appellant for a period of two months on 12 months' probation.

The entire decision was served on 5 December 1983. Appeal was timely filed on 27 December 1983 and perfected on 14 February 1984.

FINDINGS OF FACT

On 7 May 1983, Appellant was serving as Operator on board the

United States M/V STEEL PIONEER and acting under authority of his license. The M/V STEEL PIONEER is a 4320 horsepower towboat, 168 feet in length with a beam of 40 feet. On 7 May the M/V STEEL PIONEER was pushing fifteen loaded barges. The overall length of the flotilla was approximately 1150 feet.

At approximately 2130 Appellant was navigating his flotilla southbound on the Ohio River approaching Markland Lock at Mile 531.5. The night was clear with winds of 25-30 mph. The water level at the lock was 38 feet above the normal pool stage of 12 feet, which caused a current in the direction of the locks. There are two lock chambers at Markland Lock. One chamber, 600 feet long, is located next to the shore and another, 1200 feet long, is located next to the dam. There is a guide wall extending 1200 feet from the gate of the larger lock marked in 200-foot increments. It was above water and clearly visible.

As Appellant approached the 1200 foot lock, his port lead barge struck the guidewall. The allision caused approximately $5,000 damage to the barge but no damage to the lock.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant contends that:

1. The evidence that he presented was sufficient to overcome the presumption of negligence.

2. Appellant's action constituted an error in judgment, but not negligence.

3. The sanction imposed by the Administrative Law Judge was too severe.

APPEARANCE: Nancy E. McDonald, Attorney at law.

OPINION

I

Appellant argues that the presumption of negligence was overcome by the evidence that he presented. I disagree.

The significant facts are not in dispute. Appellant concedes that he navigated his flotilla into a stationary object. He also concedes that this resulted in a presumption of negligence, but urges that his evidence rebutted the presumption. Appellant's evidence consists of his testimony and that of William A. Powell,

an employee of Ohio Barge Lines. Both stated that the manner in which Appellant approached the lock was consistent with the customary practice of towboat operators. Further, Appellant testified that the existence of unanticipated currents caused by the high water level was the proximate cause of the allision.

> However, as stated in Appeal Decision No. 2284 (BRAHN): The inference of negligence established by the fact of an allision is strong and requires the operator of the moving vessel to go forward and produce more than just cursory evidence on the presumptive matter. in order for the respondent to gain a favorable decision after the presumption is properly established, it must be shown that the moving vessel was without fault, the allision was occasioned by the fault of the stationary object, or the result of inevitable accident. Carr v. Hermosa Amusement Corp., 137 F.2d 983 (9th Cir., 1943).

The current is the only unusual circumstance which Appellant claims existed. The existence of the current, however, does not rebut the presumption of negligence. The Administrative Law Judge explained this very well as follows:

> Respondent knew there was unusually high water on the day of the accident and knew or should have know that when the gauge reading goes up there will naturally be an increase in the rate of flow of the current. This effect is readily noticed by experienced mariners. Utility Service Corp. v. Hillman Trans. Co., 244 F.2d 121, 123, (3rd Cir. 1957). In Universe Tankships v. The Munger T. Ball, 157 F Supp 237, 239 (S.D. Ala. 1957), the operator of the vessel also faced current problems. In that case, there was a strong cross-current facing the vessel as it was entering the channel. The court found that while the current was stronger than usual, it was not a phenomenon of such rarity that the current should not have been anticipated by those in charge of the vessel.

As stated in Patterson Oil Terminal v. The Port Covington, 109 F. Supp. 953, 954.

> The only escape from the logic of the rule [presumption of negligence] and the only way in which the respondent can meet the burden is by proof of the intervention of some occurrence which could not have been foreseen or guarded against by the ordinary exertion of human skill and prudence - not necessarily an act of God, but at least an unforeseeable and uncontrollable event.

Appellant has not produced evidence of any unforeseeable or

uncontrollable event that caused or reasonably could have caused the allision.

Appellant argues that his method of approaching the lock was consistent with the usual practice of towboat operators. The fact that Appellant followed the usual practice, in and of itself, is insufficient to overcome a presumption of negligence. In fact, actions of custom may be negligent, if not reasonable in themselves. Appeal Decision No. 1073 (FARACLAS).

II

Appellant argues that his actions resulted from an error in judgement, not negligence. I disagree.

A mere error in judgment is distinguishable from negligence. When an individual is placed in a position not of his own making, where he must choose between two apparently reasonable alternatives, and the individual responds in a reasonable fashion using prudent judgment in choosing an alternative that hindsight shows was a poor choice under the circumstances, he is not negligent. Appeal Decision No. 2325 PAYNE). This was not the case here. Appellant was aware of the high water and should have been aware of the corresponding current. He chose to proceed through the locks with the flotilla knowing the conditions. It was reasonable for the Administrative Law Judge to conclude that proceeding as though circumstances were normal, when they were obviously unusual was more that an error in judgment.

III

Appellant argues that the order of the Administrative Law Judge was too severe in light of the minor nature of the incident and his good record. I disagree.

A review of the record clearly indicates that the extent of the damage and Appellant's record were factors considered by the Administrative Law Judge before she issued the order.

The order here is not particularly severe. Although the two month suspension is substantial, it is not excessive. In addition, it is entirely probationary. In the absence of further charges being proved, Appellant will suffer no loss of the use of his license.

The order in a particular case is peculiarly within the discretion of the Administrative Law Judge. It will not be modified on appeal absent some special circumstance. Appeal Decision No. 2344 (KOHAJDA). Appellant has not shown a special

circumstance here.

CONCLUSION

There is substantial evidence of a reliable and probative character to support the findings that the charge and specification are proved. The hearing was conducted in accordance with the requirements of applicable regulations. The sanction is appropriate under the circumstances.

ORDER

The order of the Administrative Law Judge dated at St. Louis, Missouri on 2 December 1983, is AFFIRMED.

B. L. Stabile
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 16th day of July 1984.